United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7274

To be argued by
NICHOLAS J. HEALY

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

FEDERAL COMMERCE & NAVIGATION COMPANY, LTD.,

Plaintiff-Appellant

—against—

THE M/V MARATHONIAN, her engines, etc. and EUROPA SHIPPING CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT FEDERAL COMMERCE & NAVIGATION COMPANY, LTD.

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Appellee Europa prefaces its case for affirmance by characterizing this proceeding as a "frontal attack" on *Robins Dry Dock & Repair Co.* v. *Flint,* 275 U.S. 303 (1927), and then asserting the obvious proposition that only the Supreme Court has power to "overrule its own decisions". (Appellee's Brief, p. 2).

Appellant Federal Commerce of course agrees that neither this nor any court other than the Supreme Court itself can overrule that Court's decisions. But Europa miscontrues Federal's position when it describes it as a "frontal attack on *Robins*"; the thrust of this appeal is that by applying more modern tort principles in cases

such as *Aktieselskabet Cuzco* v. *The Sucarseco,* 294 U.S. 394 (1935), the Supreme Court itself has by implication overruled *Robins,* and this Court is therefore no longer bound by that decision.

Europa bases its case for affirmance on the contention that *Robins* was correctly decided. In so arguing, Europa can find little comfort from either the courts or the leading commentators on the law of torts. See *Petition of Kinsman Transit Co.* [Kinsman II], 388 F.2d 821, 823-824 (2d Cir. 1968); *Petition of Kinsman Transit Co.* [Kinsman I), 338 F.2d 708 (2d Cir. 1964), *cert. denied sub nom. Continental Grain Co.* v. *City of Buffalo,* 380 U.S. 944 (1965), and the other authorities cited at pp. 5-15 of Appellant's Main Brief.

Europa's attempt (Appellee's Brief, pp. 2-3) to avoid the impact of the dissatisfaction with *Robins* voiced by the authorities by suggesting that their criticism is not directed at that decision, but rather at some other "expanded, over-generalized version of the [*Robins*] Rule", is unconvincing. Perhaps the clearest indication that *Robins* indeed turned on application of the "negligent interference with contractual interests" doctrine which has since fallen into such disfavor comes from the very passage quoted by Europa, wherein Justice Holmes stated that "while intentionally to bring about a breach of contract may give rise to a cause of action", recovery would be denied because in *Robins* there was only a negligent interference with the charterer's contractual rights. *Robins, supra,* at 308-309.

Europa's assessment of the supposed practicality and fairness of *Robins* is equally unconvincing. Europa acknowledges (Appellee's Brief, p. 4) that "a tortfeasor may be presumed to have knowledge that many vessels operate under charter today . . .", and yet contends that no

liability should lie where the tortfeasor is unaware of the charter rate. This contention runs directly counter to well-founded principles of tort law, whereunder determination of the question of whether legal rights have been invaded is never made dependent upon the answer to the subsidiary question of whether the tortfeasor was aware of the *extent*, if any, of the damages likely to result from the tort. The following passage quoted in Prosser on *Torts* (4th ed. 1971), at pp. 260-261 (footnote 3), is a clear expression of this principle:

> "If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. * * *" Mitchell, J, in *Christianson* v. *Chicago, St. P.M. & O. R Co.*, 1896, 67 Minn. 94, 69 N.W. 640.

See also 1 Harper and James, *The Law of Torts* 501-505 (1956 ed.), where, in the context of a critique of *Robins*, the authors state that "It should be enough to establish a prima facie case if the defendant, as a reasonable man, should have known of the likelihood of the *existence* of the contract and thereafter created an unreasonable risk of interfering with it * * *." (Emphasis added).

Moreover, Europa's argument in this respect is wholly inconsistent with the rule which permits the owner of a

vessel negligently damaged in a collision to recover detention damages from the offending vessel based upon the rate at which the owner has been able to charter the vessel to another, regardless of market. Thus, if the ROLWI's owners had chartered their vessel to Federal at a rate of $200,000 per month, and the vessel was "off hire" for three months as a result of the collision, they would have been plainly entitled to detention damages of $600,000 (less any savings effected during the detention period), even though the market rate for a comparable vessel at the time might have been only $100,000 per month.

Europa's inquiry (Appellee's Brief, p. 4), concerning the rights of subcharterers is wholly irrelevant to the issues before this Court. They may very well have a right to recover detention damages under similar circumstances, but whether they do or not has no bearing whatever on the question of whether a "head" charterer who has time chartered the damaged vessel directly from her owners has rights for the invasion of which the law recognizes a right of action.

Europa's contention (Appellee's Brief p. 5) that *Robins* has been "consistently followed by our Courts and the same rule applies in England" is readily refuted. Apart from the recent departures from *Robins* in *The Buko Maru*, 348 F.Supp. 549 (N.D. Ill. 1972), aff'd 505 F.2d 579 (7th Cir. 1974) (Decision on Damages unreported and appended to Appellant's Main Brief), and the other decisions cited at pp. 11-12 of Appellant's Main Brief, it was this Court that refused to apply the concept of "negligent interference with contract" in favor of more familiar tort principles of negligence, causation and foreseeability. *Kinsman II, supra*, at 823-824.

In following the trend away from application of the "negligent interference with contract" concept, *The Buko Maru*,

contrary to Europa's assertion, not only allowed recovery to the "proprietor" railroads, but to a number of others having only "contractual rights" to the use of the damaged bridge. Europa's assertion (Appellee's Brief, p. 8) that in affirming the District Court the Court of Appeals for the Seventh Circuit did not refer to the District Court's Decision on Damages but rather to "another decision of the District Court reported at 348 F.Supp. 549" is inaccurate. The Court of Appeals decision unanimously affirmed the District Court's judgment of June 25, 1973, *which expressly adopted and incorporated its Decision on Damages,* entered June 19, 1973, appended to Appellant's Main Brief. A copy of the Judgment Order of June 25, 1973 is annexed hereto.

Contrary to Europa's final assertion (Appellee's Brief, pp. 8-9) *Spartan Steel and Alloys Ltd.* v. *Martin & Co. (Contractors) Ltd.,* 3 A.E.R. 557 (Court of Appeal 1972), does indeed reflect the trend in England toward allowance of a recovery to one who has suffered economic loss as a result of negligent damage to the the property of another. By relying entirely for its assertion upon the opinion of Lord Justice Lawton which, in turn, rested heavily upon *Cattle* v. *Stockton Waterworks Co.,* [1874-80] All E.R. 220, Europa seeks, in effect, to memorialize a century-old decision which, in the well-reasoned dissenting opinion of Lord Justice Davies, was intended to stand only for the proposition that "the pecuniary loss sustained by the plaintiff in *that* case * * * was not recoverable because it was too remote". 3 A.E.R., at 567. As further stated by Lord Justice Davies:

> "Despite the frequency with which *Cattle* v. *Stockton Waterworks Co.* is cited as authority for the proposition that pecuniary loss, without more, can never sustain an action for negligence, I respectfully venture to think that Blackburn J was there laying down no such rule * * *".

Lord Denning, M.R., was in complete accord with the above assessment of *Cattle* v. *Stockton Waterworks Co.*, stating at 3 A.E.R. 562:

> "In many of the cases where economic loss has been held not to be recoverable, it has been put on the ground that the defendant was under no *duty* to the plaintiff * * *.
>
> In other cases, however, the defendant seems clearly to have been under a duty to the plaintiff, but the economic loss has not been recovered because it is too remote. Take the illustration given by Blackburn J in *Cattle* v. *Stockton Waterworks Co.* * * *".

In sum, the holdings in *Spartan Steel Ltd.* and *Cattle* v. *Stockton Waterworks Co.* no more reaffirm the vitality of a doctrine which would deny recovery for negligent interference with contractual interests than did the finding in *Kinsman II, supra,* that the damages there were too remote to be compensable.

Respectfully submitted,

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APPENDIX

APPENDIX

Judgment Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Consolidated Case No. 70 C 2259
No. 70 C 1837

COMPLAINT OF THE GREAT LAKES TOWING COMPANY as Owner of the tugs ARIZONA and JOSEPH H. CALLAN for Exoneration From or Limitation of Liability,

CHICAGO AND WESTERN INDIANA RAILROAD COMPANY, a corporation, *et al.*,

Plaintiffs,

VS.

MOTORSHIP BUKO MARU, etc., *et al.*,

Defendants.

A Complaint for exoneration from or limitation of liability having been filed in this Court by The Great Lakes Towing Company on September 15, 1970 (No. 70 C 2259) pursuant to 46 U.S.C. §183 *et seq.* and Rule F of the Supplemental Rules For Certain Admiralty and Maritime Claims to the Federal Rules of Civil Procedure, praying for exoneration from or limitation of liability for certain loss and damage arising out of a collision occurring on July 13, 1970 upon the Calumet River in Chicago, Illinois

between the Motorship Buko Maru and the Mainline Bridge of the Chicago and Western Indiana Railroad Company;

And an Order having been duly entered on September 15, 1970 approving the Security for Value and Cost in the amount of $210,970.60;

And an Order having been duly entered directing a monition to issue against all persons claiming damages for any and all loss or damage occasioned by or resulting from the aforesaid collision citing them to file their re-respective claims with the Clerk of Court on or before October 27, 1970;

And the following claimants having appeared and made claims:

CHICAGO AND WESTERN INDIANA RAILROAD COMPANY
CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY
ERIE LACKAWANNA RAILROAD COMPANY
GRAND TRUNK WESTERN RAILROAD COMPANY
MONON RAILROAD
NORFOLK AND WESTERN RAILWAY COMPANY
THE SANKO STEAMSHIP CO., LTD.
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY
CHESAPEAKE AND OHIO RAILWAY COMPANY
THE BELT RAILWAY COMPANY OF CHICAGO

And no other persons having presented any claim against the plaintiff, The Great Lakes Towing Company;

And the Chicago and Western Indiana Railroad Company et al., having filed a suit against the Motorship Buko Maru, The Sanko Steamship Co., Ltd., the tug Joseph H. Callan, the tug Arizona and The Great Lakes Towing Company, said action numbered 70 C 1837;

Judgment Order

The Complaint of The Great Lakes Towing Company numbered 70 C 2259 having been consolidated with the Complaint of the Chicago and Western Indiana Railroad Company, et al., numbered 70 C 1837, for trial on the issue of liability;

And the case having been tried on the pleadings and proofs of the respective parties on the issue of liability, and the Court having entered its Decision on March 2, 1972;

And the issue of damages having been submitted to the court for decision on the basis of stipulations filed on October 10, 1972 and March 9, 1973, and the court having entered its Decision on Damages on June 19, 1973, as amended by Order entered June 20, 1973;

Now, therefore, it is

ORDERED, ADJUDGED AND DECREED,

1. That the Decision of this Court, heretofore filed herein on March 2, 1972 and June 19, 1973, as amended be and are hereby adopted as the Court's Findings of Fact and Conclusions of Law.

2. That the collision described in the Complaint of The Great Lakes Towing Company was not caused by any fault or neglect on the part of The Great Lakes Towing Company or its tugs Joseph H. Callan and Arizona.

3. That The Great Lakes Towing Company be and hereby is forever exonerated and discharged from all loss or damage arising from the aforesaid collision and the claims and complaints of The Sanko Steamship Co., Ltd., the Chicago and Western Indiana Railroad Company, and all other claimants or plaintiffs in these consolidated

cases, be and the same are hereby dismissed with prejudice as against The Great Lakes Towing Company.

4. That all costs having been paid by The Great Lakes Towing Company, the liability on its Security for Value and Costs in the amount of $210,970.60 be and the same is hereby discharged.

5. That the collision of the Motorship Buko Maru with the Chicago and Western Indiana Railroad Bridge and the consequences described in the Complaint in Cause No. 70 C 1837 were caused by the fault and negligence of the Motorship Buko Maru and the Sanko Steamship Co., Ltd. and the said Motorship Buko Maru and her owners, The Sanko Steamship Co., Ltd. are liable to the plaintiffs in Complaint No. 70 C 1837 for the full amount of damages sustained together with interest and costs.

6. That The Great Lakes Towing Company in case numbered 70 C 2259 recover from The Sanko Steamship Co., Ltd. and the Motorship Buko Maru, its costs to be taxed by the Clerk of this Court.

7. That plaintiffs Grand Trunk Western Railroad Company and Norfolk & Western Railway Company having withdrawn their claims shall take nothing and their respective actions be and the same are dismissed with prejudice.

8. That the following plaintiffs or claimants are hereby awarded damages against and shall recover of and from defendant Motorship Buko Maru and of defendant The Sanko Steamship Co., Ltd. the sums set opposite their respective names:

Chicago and Western Indiana Railroad Company	$666,108.10
Chicago and Eastern Illinois Railroad Company	11,318.05
Monon Railroad	23,846.25
Erie Lackawanna Railroad Company	149,227.55
The Belt Railway Company of Chicago	5,038.62
Chesapeake and Ohio Railway Company	13,906.67
Elgin, Joliet & Eastern Railway Company	4,381.74

and the Court directs that this is a final judgment as to the seven claims above tabulated, there being no just reason for delay in the entry of judgment thereon; and executions may issue in favor of the said claimants.

9. That the claimants whose damages are determined by Paragraph 8 of this Judgment Order shall also have and recover interest on the respective amounts so awarded from December 1, 1970 to the date of this Order at the rate of six per cent per annum, and thereafter at the rate of six per cent per annum as provided by statute until paid, and each claimant awarded damages shall recover costs to be taxed by the Clerk of this Court.

Dated at Chicago, Iilinois this 25th day of June, 1973.

ENTER:

/s/ Thomas R. McMillen
Thomas R. McMillen,
United States District Judge

[Approvals as to form deleted]

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